No. 13149.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,

Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Jurisdiction.

1. The statutory provision giving the District Court jurisdiction of the cause is:

United States Code, Title 28, Sec. 1331.

2. Existence of the requisite jurisdictional facts are stated in the first paragraph [T. 3] of the order appointing Receiver made by the United States District Judge, United States District Court for the Eastern District of New York, wherein it is stated that Plaintiff United States filed herein a verified complaint for the foreclosure of Federal tax liens against the named Defendants pursuant to provisions of Section 3628 of the Internal Revenue Code.

3. Statutory provisions sustaining jurisdiction of the Court of Appeals as to this matter are: United States Code, Title 28, Sections 1291, 1292; Federal Rules of Civil Procedure 54(a). The appeal [T. 58] is taken from a final decision or order [T. 46] of August 31, 1951, purporting to vacate the order made August 13, 1951 [T. 30] and thus finally adjudicating the rights of Appellant as accepted bidder at the sale held on August 13, 1951. Likewise the appeal [T. 72] is taken from the final order dated October 25, 1951 [T. 70] directing the property be sold unless Appellant file a supersedeas bond by October 26, 1951, and is a final order as to the sale authorized for the same reasons above mentioned as to the order of August 31, 1951.

Statement of the Case.

This is an appeal from an order made August 30, 1951 [T. 46-48] and entered on August 31, 1951 [T. 98] purporting to vacate and set aside an order made by the Court at a judicial sale held August 13, 1951 [T. 30-31] and entered on August 13, 1951 [T. 97] ordering that certain real property be sold to Appellant D. B. Salisbury.

Appellant D. B. Salisbury was the successful bidder at the advertised public auction sale held on August 13, 1951, as to certain real property on Orange Grove Avenue, Pasadena, California. The Court acted as auctioneer at the sale held in the courtroom, accepted the bid of Appellant D. B. Salisbury, and ordered said property sold to D. B. Salisbury for $60,110. [T. 31, 97.]

Plaintiff United States of America commenced this action in the United States District Court for the Eastern District of New York to foreclose Federal tax liens pursuant to Section 3678 of the Internal Revenue Code against De-

fendants Canadian American Company, Inc., and James Albert Wigmore. Joseph F. Ruggieri was appointed Receiver of certain assets of Defendants, including the Orange Grove Avenue property herein involved. [T. 3, 8.]

The District Court for the Eastern District of New York made an order on June 8, 1951, authorizing the Receiver to offer for sale and to sell, the Orange Grove Avenue property. [T. 8-13.]

The District Court for the Southern District of California made an order dated July 12, 1951 [T. 13, 15] directing that the Orange Grove Avenue property be sold on August 13, 1951, at public auction in Courtroom No. 6 in the United States Post Office and Courthouse Building at Los Angeles to the highest bidder or bidders [T. 13] and that the D. B. Salisbury offer in writing to purchase the property be considered at the auction. [T. 14.]

Appellant D. B. Salisbury made an offer in writing filed July 12, 1951, to purchase for $60,110 from the Receiver, a parcel of real property, one of the assets of the Receiver, at 915-955-1003 Orange Grove Avenue, Pasadena, California. [T. 21-25; 17.]

Said order, dated July 12, 1951, was made upon Petition filed by the Receiver that said sale be held at public auction and that the bid of D. B. Salisbury of $60,110 be considered by the Court at the sale to be held. [T. 15-18.]

Notice of the sale was published by the Receiver. [T. 97.] Said Notice, among other things, recited that D. B. Salisbury has offered to purchase said real property and pay therefor the sum of $60,100. [T. 27.]

Pursuant to the July 12, 1951, order [T. 13-15] and Notice of Sale [T. 24-28] a public auction was held on

August 13, 1951, in said Courtroom, the Court itself called for bids, the Court accepted said bid of D. B. Salisbury and ordered said Orange Grove Avenue parcel of real property sold to Appellant D. B. Salisbury for $60,110. [T. 30-31, 77.] Attorney for the Receiver was directed by the Court to draw a formal order. [T. 77.]

On August 16, 1951, the Receiver filed a motion in writing [T. 33-46] "to vacate and set aside the sale and any minute order made in connection therewith . . . on August 13, 1951 . . . to D. B. Salisbury . . ." [T. 33.] The motion is based on the first ground, "because of mistake, inadvertence, surprise and excusable neglect the Receiver herein was deprived of giving consideration to and acting upon an offer to purchase said property by one Theodore J. Tictin. . . ."

Said motion to set aside the August 13, 1951, sale was also made on the ground "that the price at which said real property was authorized to be sold to D. B. Salisbury was grossly inadequate and grossly disproportionate to the market value of said real property . . ." [T. 36.]

By an appraiser appointed by the Court at the request of the Receiver, the Orange Grove Avenue property was appraised at $65.000. [T. 51.]

On August 15, 1951, two days after the sale to Appellant, said Tictin made an offer in writing to purchase said property at $80,000 less commission. [T. 37-38.]

On August 30, 1951, the Court granted the motion of the Receiver "to vacate and set aside the sale and minute order of 8/13/51" and said motion was granted upon certain conditions. [T. 46.] The formal order was signed and entered on August 31, 1951. [T. 46-48, 98.]

Said August 31, 1951, order provided also that said property be sold at public auction and that the offer of $80,000 of one Theodore J. Tictin for said property be considered at the sale. [T. 47.] Said order was made subject to certain conditions as to deposits and payments of commissions. [T. 47-48.]

Thereafter the Receiver made a motion for order requiring Appellant D. B. Salisbury to furnish and file supersedeas bond. [T. 61.] The Court on October 25, 1951, made an order, upon this motion of the Receiver, requiring Appellant D. B. Salisbury to furnish and file a supersedeas bond. [T. 70, 100.]

Appellant appeals from the August 31, 1951, order purporting to vacate the August 13, 1951 order. [T. 58.] Appellant also appeals from the October 26, 1951, order directing Appellant to file supersedeas bond and ordering that said property be sold pursuant to orders of Court if said bond be not filed. [T. 72, 70, 71.]

Apparently the "mistake" etc., referred to is the response of the Secretary of the Judge "that deponent was advised that the judge had just gone on the bench and that she could not communicate with the judge . . ." [T. 39.]

The affidavit of Tictin referred to in said motion of the Receiver, recites that affiant first learned of the sale on ". . . the morning of August 13, 1951, and that deponent then decided, to make a bid or such bids as may be necessary to acquire the property"; "That deponent was prepared to bid up to $80,000.00 . . ." [T. 39-40.] The Tictin affidavit was made two days after the announced sale to Appellant at $60,110. [T. 39-40.] The last published advertisement under Court order was on August 2. 1951, eleven days before the holding of the sale when Tictin telephoned as stated above. [T. 13-15.]

Specifications of Errors.

I.

The District Court erred in making the August 31, 1951, order vacating the August 13, 1951, order made by the Court itself and ignoring that the rights of Appellant as purchaser had become vested.

II.

In making said order, the Court erred by abusing its discretion in setting aside a judicial sale in the absence of gross inadequacy of price sufficient to shock the conscience of the Court and raise a presumption of fraud in the conduct of the sale.

III.

The Court erred in the making of said order by considering only that the price of Appellant was inadequate and without considering whether said inadequacy was sufficient to shock the conscience of the Court and raise a presumption of fraud in the conduct of the sale.

IV.

In making said order, the Court erred in determining that the price bid by Appellant was inadequate by using as a basis, a comparison between the accepted bid price with that of the subsequent bid offered.

V.

The Court erred in setting aside a judicial sale previously approved by the Court in the absence of fraud or unfairness in the conduct of the sale.

VI.

In setting aside said sale, the Court erred in not balancing the equities (presuming but not conceding, the stranger has the right to have the equities balanced or to be considered at all) between Appellant who made his bid in good faith at the invitation of the Court as against a stranger to the proceedings who failed because of his own infirmities to arrive at the sale at the advertised time and bases his purported claim upon a single telephone call, also too late. [T. 38-40.]

VII.

The lower Court erred in setting aside said August 13, 1951, sale by the August 31, 1951, order, by failing to consider that the sale made to Appellant had been made and confirmed by the Court itself; that the rights of Appellant as purchaser had become vested; and that the August 13, 1951, sale was not subject to a second approval by the Court. [T. 30.]

VIII.

The Court erred in making said October 25, 1951, order, by requiring and directing that Appellant furnish and file a supersedeas bond.

IX.

The Court erred in making said October 25, 1951, order because it conflicted with the prior August 13, 1951, order made by the Court.

X.

The Court erred in making said October 25, 1951, order with respect to that part thereof directing that a sale be made in accordance with orders heretofore or hereafter made in each separate respect, it is stated above that the Court erred in the making of the August 31, 1951, order.

Summary of Argument.

To set aside a judicial sale, made at a public auction upon the sole ground that a new "bidder" has appeared who offers more than the previously accepted bid, is an abuse of discretion. This is the law as to sales made subject to confirmation. As to sales made in the presence of the confirming power of the Court—when confirmation of the act of some officer of the court is not required, the rule is the same as that applicable to sales between individuals—fraud or equivalent wrongdoing must be shown. More is required to set aside a sale made by the Court, than a sale by an officer subject to Court approval.

It is not the law that a subsequent bidder may wait until the property has been struck off to another and then have the bidding reopened or even a sale set aside because the subsequent "bidder" makes an offer higher than the known accepted bid. The mere offer to pay more than the accepted bid is not grounds for setting aside a judicial sale.

Neither inadequacy of price alone nor gross inadequacy of price alone is ground for refusal to confirm a judicial sale. When the price bid is not only grossly inadequate but also so grossly inadequate as to give rise to a legal presumption of fraud, unfairness or mistake, a judicial sale may be set aside. To set aside a judicial sale otherwise, is an abuse of discretion.

In the instant situation, Appellant's bid price accepted by the Court is neither grossly inadequate nor inadequate upon standards recognized by law. The mere opinion expressed by the unqualified, a comparison made because one bid is

higher than the other, or the fact that "Johnnie-come-late" offers a higher price, are not recognized by law as the bases upon which to determine that a price is inadequate, grossly inadequate or that the sale was fraudulently or unfairly conducted.

The Court ordered set aside the sale made to Appellant on August 13, 1951, because the Court desired to obtain a higher price, offered after the accepted bid price of Appellant was known. The Court itself had already accepted the $60,110 offer of Appellant and ordered the property sold to Appellant. As justification for setting aside the sale, the Court compared the $60,110 bid by Appellant with the higher price offered by one Tictin in writing two days after the sale to Appellant. It is an abuse of discretion to find the price bid "inadequate" on this comparison with a subsequent bid basis. Therefore, there was no justification and it was an abuse of discretion (authorities herein cited) for the Court to make the August 31, 1951, order setting aside the August 13, 1951, sale to Appellant.

Affirmance of the Court order setting aside its own sale under the facts involved, means that anybody failing to get to the sale in time may have set aside the sale already made, and thereafter have considered, the "bid" of the delayed "bidder" made after the accepted bid price is known. These facts reveal a situation no different factually than that of the common situation wherein a subsequent offeror "bids" or offers a higher price after the amount of the accepted bid is known. This not uncommon situa-

tion is plainly within the rule that a judicial sale will not be set aside because thereafter a higher price is offered. Affirmance of the Court order in setting aside its own sale under these facts would penalize those who observe and comply with the Court's notice, accept the Court's published invitation and bid in good faith; affirmance will establish a special and inequitable advantageous procedure for those who fail to attend the publicized sale, fail to arrive in time or wait until bidding is frozen by acceptance and then make a higher offer. The highest bidder brought to the sale by the invitation of the Court has the right to expect the Court to abide by its judgment that the sale is made to the highest bidder. Whether the subsequent "bidder" "attempts" to communicate by telephone, climbs in the window or signs a firm offer two days after the sale, the situation is still one in which an offeror, after the announced sale at a price specified, makes a higher offer than that previously accepted by the Court.

The instant judicial sale did not require confirmation by the Court; the Court confirmed the sale when the court adopted the role of auctioneer and accepted Appellant's bid. The Court now by order made on motion attempts to vacate its prior order or judgment. Appellant upon acceptance of his bid by the Court itself gained a right which could be quashed only for cause recognized by law as a cause.

The Appeal From the Order Dated October 25, 1951.

This is also an appeal [T. 72] from the order [T. 70] made and entered October 25, 1951 [T. 71, 100] upon motion of the Receiver. The order, among other things, required Appellant to furnish by five o'clock the next day, a $20,000 "supersedeas bond" (October 26, 1951) as a condition precedent to staying a sale for the purpose of Appellant prosecuting this appeal. The order further provided that if said bond be not filed within the time required that the sale of said property shall be made pursuant to orders of this Court "heretofore or hereafter made." The supersedeas bond was not filed [T. 94-101].

The order in authorizing the sale of said property pursuant to orders of the Court heretofore or hereafter made if the bond be not filed before five o'clock Friday, October 26, 1951, is in conflict with the order made on August 13, 1951, and therefore subject to invalidity upon the same grounds upon which this Appeal is urged as to the August 31, 1951, order.

Furthermore, the order is invalid because the matter of filing a supersedeas bond is a privilege to be exercised by Appellant if Appellant elects to exercise the privilege. Filing a supersedeas bond is not subject to mandatory direction requiring the Appellant to file such a bond. Also, Appellant has the right to file a supersedeas bond within the time permitted by law for the purposes for which supersedeas bonds are filed. It is submitted that the order and every part thereof made under date of October 25, 1951 [T. 70-71] is invalid.

ARGUMENT.

I.

Acceptance of Appellant's Bid by the Court at the Judicial Sale Held August 13, 1951, Gave Appellant Salisbury a Vested Right Recognized by Law of Which Appellant Cannot Be Deprived Without Cause Recognized as Sufficient as a Matter of Law. Both the Court and Appellant Became Bound by the Transaction. Appellant Became Subject to an Enforceable Contract.

A. The successful bidder at a judicial sale acquires a vested right not subject to deprivation except for cause:

> "He acquires by acceptance of his bid, a vested right, sometimes called an equitable or inchoate title, which is recognized and enforced by law, and must be respected by the court, and which may not be disregarded or taken away from him except for sufficient legal or equitable reasons."
>
> *Blossom v. Milwaukee* (1865), 3 Wall. 196, 18 L. Ed. 43.

> "Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto . . ."
>
> *Pewabic Mining Co. v. Mason* (1892), 145 U. S. 349, 356, 125 S. Ct. 887, 36 L. Ed. 732;
>
> Quoted in *In re Stanley Engineering Corporation* (3d Cir. (1947), 164 F. 2d 316, 319.

". . . it is the right of one bidding in good faith, at an open and public sale, to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid . . ."

Ballentyne v. Smith (1906), 205 U. S. 285, 289.

B. The binding effect in law of the acceptance of the bid is illustrated by the rule that the successful bidder at the judicial sale can be compelled to carry out his contract.

Camden v. Mayhew (1888), 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608;

Gordon v. Woods (1951), 1 Cir., 189 F. 2d 76;

In re Lane Lumber Co. (1913), 9 Cir., 207 Fed. 763, 766;

In re Jungman (1911), 2 Cir., 186 Fed. 302;

In re Rival Knitting Co. (1923), 2 Cir., 289 Fed. 960, 963;

In re Hugenot Pub. Co. (1936), 83 F. 2d 258;

Morrison v. Burnett (1907), 1 Cir., 154 Fed. 617.

C. And as to the Court:

". . . the court is as firmly bound in law and morals as any private citizen by his own executed sale."

Files v. Brown (1903), 8 Cir., 124 Fed. 133, 138.

II.

Inadequacy of Price Alone, When There Is No Unfairness in the Conduct of the Sale, Is Not Ground Upon Which to Set Aside a Judicial Sale and Deprive Appellant of His Rights as Accepted Purchaser.

Comparison of Appellant's accepted bid with the offer subsequently made by one Tictin is not a permitted standard by which to determine adequacy of price. However, presuming the price to be inadequate on this unacceptable basis, it does not follow that the sale to Appellant can be set aside, in the absence of fraud or misconduct, without the Court abusing its exercise of discretion. Inadequacy of price alone is not grounds upon which a judicial sale may be set aside.

Ballentyne v. Smith (1906), 205 U. S. 285, 290;

Parker v. Commissioner of Internal Revenue (1948), 166 F. 2d 365;

In re Burr Mfg. & Supply Co. (1914), 2 Cir., 217 Fed. 16, 21;

Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co. (1937), 2 Cir., 20 Fed. Supp. 634, 640.

The Court of Appeals, Third Circuit, reversed an order directing a resale to consider a $20,000 bid received prior to confirmation of the $17,000 bid previously accepted. The Court directed confirmation of the $17,000 bid, pointing out that mere inadequacy of price was not sufficient ground to set aside a sale.

In re Metallic Specialty Mfg. Co. (1912), 3 Cir., 193 Fed. 300.

". . . something more than mere inadequacy of price must appear before the sale can be disturbed. . . ."

Pewabic Mining Company v. Mason, supra.

III.

Judicial Sales Will Not Be Set Aside Unless: (a) There Was Fraud, Unfairness or Mistake in the Conduct of the Sale; or (b) The Price Brought at the Sale Was so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake.

". . . now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience or unless there be additional circumstances against its fairness. . . ."

Ballentyne v. Smith (1907), 205 U. S. 285, 290;

In re Stanley Engineering Corp. (1947), 3 Cir., 164 F. 2d 316, 319.

"The rule is well settled that a judicial sale regularly made in the manner prescribed by law, upon due notice, and without fraud, unfairness, surprise or mistake, will not generally be set aside or refused confirmation on account of mere inadequacy of price, however great, unless the inadequacy is so great as to shock the conscience and raise a presumption of fraud, unfairness or mistake. (Citing) *Spears Sand and Clay Works v. American Trust Co.* (C. C. A.) 52 F. 2d 831, 835. See, also, *Ballentyne v. Smith,* 205 U. S. 285, 27 S. Ct. 527, 51 L. Ed. 803; *Jackson v. Fuller,* 56 App. D. C. 239, 85 F. 2d 816; *Warner Bros. Pictures v. Lawton-Bryne-Buener Ins.*

Inc. (C. C. A.), 79 F. 2d 804; *Bovay v. Townsend* (C. C. A.), 78 F. 2d 343, 105 A. L. R. 359; *Bethlehem Steel Co. v. International Combustion Engine Corp.* (C. C. A.), 66 F. 2d 409."

Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co. (1937), 2 Cir., 20 Fed. Supp. 634, 640.

"The rule is that inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court. The difference between $6,250, for which the property was first sold, and $7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the amount of $8,500, realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In Lankford v. Jackson, 21 Ala. 650, property worth $1,000 was sold for $6. In Daly v. Ely, 51 N. J. Eq. 104, 26 Atl. 263, property worth $2,500 was sold for $50. In Hardin v. Smith, 49 Tex. 420, property worth from $2 to $5 an acre was sold for 8¢ per acre. . . . The circumstances relied upon raise no presumption of fraud or unfairness."

In re Burr Mfg. & Supply Co. (1914), 2 Cir., 217 Fed. 16, 21.

The Receiver petitioned and requested the Court to hold a public sale and that Appellant's bid of $60,110 be considered at the sale [T. 15-18]. Notice of sale specifically mentioning Appellant's bid of $60,110 was pub-

lished [T. 97] and also mailed to certain parties of record [T. 28-30].

The appraiser appointed by the Court appraised the property sold on August 13, 1951, as having a value of $65,000 [T. 48-51]. Appellant bid $60,110 and his bid was accepted [T. 30-31] at this price by the Court itself. All this establishes that the sale was fairly and properly conducted.

IV.

Finding That the Price Bid Is Inadequate Because of the Difference Between the Accepted Price Bid and a Subsequent Higher Offer Is an Abuse of Discretion. In Determining Adequacy of the Price the Court Must Consider Appraisement of the Property as a Guide in the Exercise of Its Discretion.

> "In determining whether gross inadequacy exists the bankruptcy court must take into consideration an appraisement of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited."
>
> *In re Stanley Engineering Corp.* (1947), 3 Cir., 164 F. 2d 316.

In the case quoted above, the assets were appraised at $50,000; the Appellant (Galman) bid $57,250; after the sale, another bid $63,250 which Appellant matched; the delayed bidder then offered $67,250 and this the Court accepted, refusing to confirm the sale of Appellant therein. As to this erroneous ruling, the Court of Appeals, 3rd Circuit, said:

> "makes it crystal clear that the . . . rejection of the Galman bid . . . and its acceptance of the higher bid

> . . . was solely due to the court's desire to obtain . . . the $10,000 difference between the two bids." p. 318

> "had the court refused confirmation of the sale upon a finding of inadequate price, based upon the difference between the bids made and the bids proposed, it would have exercised a discretion of doubtful validity. Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; In re Metallic Specialty Co., 193 F. 300." *Jacobson v. Larkey* (1917), 245 Fed. 538.

The record discloses that the lower Court considered the difference in the bids [T. 79] and actually considered the $10,000 difference in the *Stanley* case in comparison with the $20,000 herein [T. 79]. (The $20,000 is not the net difference.) [T. 84-88.] In failing to consider the appraised value and in considering only the difference of the two bids, it is submitted the lower Court abused its exercise of discretion.

The record discloses that the lower Court considered the higher price offered and on the basis of this comparison and only on this basis, concluded the accepted price of Appellant was inadequate.

> ". . . But the court may look at the difference in the bids to determine the value of the property." [T. 79.]

Setting aside a judicial sale on the above basis, it is submitted is a violation of the principles established by the authorities herein cited as an abuse of discretion in the exercise of the Court's discretion.

(It should be noted here that the District Court apparently presumed authorities then being considered [T. 79] could be distinguished "because the confirmation had

already taken place" thus overlooking the fact that the sale herein made also took place at the bar of the Court, was made by the Court itself and was not subject to Court approval.) [T. 73.]

The sale herein was final; confirmation by the Court of its own act was not required.

V.

A Subsequent Offer to Pay More Than the Price Previously Bid and Accepted Is Not Ground for Setting Aside a Judicial Sale and Depriving the Accepted Bidder of His Rights.

"After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. Morrisse v. Inglis, 46 N. J. Eq. 306, 19 A. 16; In re Metallic Specialty Mfg. Co., D. C. 193 F. 300, In re Shapiro, D. C., 154 F. 673."

In re Stanley Enginering Corp. (1947), *supra; Jacobson v. Larkey* (1917), 245 Fed. 538.

"We recognize that except upon the extremest provocation courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the knock-down price. (Citing cases.) This unwillingness results from the effect upon such sales of knowing that a prospective bidder may abstain from bidding at the auction, may bide his time, and may then outbid the price at which the

property has been struck down. That possibility tends to chill bidding at the sale, to dispose of the property by later competition on successive bids, and thus to defeat the very purpose of an auction, which is to fetch together all those who may be interested to buy and to set them against each other with whatever stimulus that may provide, as opposed to other kinds of sale."

Knight v. Wertheim & Co., 2 Cir. (1946), 158 F. 2d 838.

"a sale . . . will not . . . be set aside for mere inadequacy of price unless such inadequacy is so gross as to fairly raise a presumption of fraud. The practice of opening biddings and setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the terms thereof, or who shows his willingness and ability to do so, is not only entitled to the protection of the court but as a party to the proceedings, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of inadequacy, fraud or mistake before alluded to."

Sturgiss v. Corbin (1905), 4 Cir., 141 Fed. 1.

In the instant situation, the Court considered the fact that the subsequent offer was higher. [T. 79.] The fact that a higher price was offered (after the accepted bid price was known) is not ground for setting aside a judicial sale, is not indicative of gross inadequacy of price and certainly is not indicative of fraud or an unfairly conducted sale.

VI.

Setting Aside a Judicial Sale in the Absence of Fraud, Unfairness or Mistake in the Conduct of the Sale or a Sale at a Price so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake Is an Abuse in Errors of Legal Discretion, and Reversible Error.

"When the bankruptcy court failed to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion."

In re Stanley Engineering Corp., p. 319, *supra.*

VII.

The Authorities Should Be Distinguished as to Their Application to a Sale Made Subject to Confirmation by the Court and a Sale Which Was Previously Made or Confirmed by the Court and as to Which the Court Thereafter Seeks to Vacate the Confirmed Sale. A Sale Made by the Court Itself May Be Vacated Only for Cause Recognized in Sales Between Private Individuals.

Because of the principles applicable, Appellant has heretofore cited authorities most of which involve sales made subject to confirmation by the Court. In these situations, the Court obviously has a power or discretion as to the sale yet to be confirmed not extant when the question of actually setting aside or quashing a sale previously made by the Court itself is involved. In the instant situation the sale on August 13, 1951, was made by the Court itself. The

point is, that the situation as to the Appellant is even stronger in the instant situation than those involved in the preceding authorities cited.

In the Matter of Burr Mfg. & Supply Co. (1914), 2 Cir., 217 Fed. 16;

Sturgiss v. Corbin (1905), 4 Cir., 141 Fed. 1.

VIII.

The Court Should Not Have Considered the Attempts of a Stranger to the Proceedings to Telephone the Court in Determining to Set Aside Its Own Judicial Sale Made to Appellant.

It is noted that the Court considered the attempt of a stranger to these proceedings—one Tictin—to communicate with the Court by telephone and his failure to do so, before the sale. [T. 39, 80.] Acceptance of this attempted communication will add a new ground for setting aside a judicial sale and will ignore and circumvent the plain rule that a judicial sale will not be set aside merely because a subsequent bidder offers a higher price. Acceptance of this attempted last minute telephone call, will also defeat and circumvent the rule as to stability of judicial sales. It should be noted that the Tictin affidavit [T. 38-40] does not state the time the phone call was made, the time at which the sale was held, where Tictin was at the time he made the call, why the subsequent bidder failed to arrive at the sale in time after making the phone call. [T. 38-40.] It should also be noted that said Tictin himself swears [T. 39] that he learned the time of the sale from the advertisement, of which the last was published under Court order on August 2, 1951, eleven days before Tictin telephoned the Court order the day of the sale on August 13, 1951. [T. 12-15.] Acceptance of this

attempted telephone call as ground for setting aside a judicial sale ignores the rights vested in the purchaser and ignores also that this was not a sale made subject to confirmation but was a sale made by the Court itself. Setting aside a sale accepted by the Court upon these facts does not balance the equities between the bona fide purchaser accepting the invitation of the Court and appearing at the Court on time and doing all that was expected of him as against one who not only fails to arrive at the sale on time because of his own infirmities but also seeks the special privilege of making and having his bid considered after the acceptance of the known bid of Appellant.

In a similar situation (*Pewabic Mining Co. v. Mason*), a telegram was sent on a Friday asking that the sale scheduled for Saturday be postponed because of religious reasons as to the absent would be bidder. The sale was not postponed although the telegram was received in ample time thereto. Thereafter the subsequent bidder offered $20,000 more than the $700,000 at which the property was sold at the scheduled sale which was subsequently increased to $800,000 and as to this situation, the United States Supreme Court said:

> ". . . It is a singular fact that his first appearance in the case was the day before the sale, and his first appearance in court the day after confirmation. If it had all been planned, he could not have been more opportunely ignorant before and more accurately late afterwards. . . ." (P. 366, 7.)

* * * * * * * *

". . . it is enough that it comes too late. Surely no one would suppose that an officer having charge of the sale of property of such value, a sale made at the end of prolonged litigation, should at the last moment, in response to a dispatch from a stranger, postpone the sale. . . ." (P. 367.)

Pewabic Mining Company v. Mason (1892), 145 U. S. 349, 366, 367.

"Courts will not refuse to confirm a judicial sale or order a resale in the motion of an interested party, merely to protect him against the results of his own negligence . . ."

Abbott v. Berle (1907), 80 N. E. 990, 992.

IX.

The Order Made August 31, 1951, and the Order Made October 25, 1951, From Which This Appeal Is Taken, Are Appealable Orders.

The August 31, 1951, order vacating the judicial sale made August 13, 1951, to Appellant, is a final determination of all rights of Appellant herein and is therefore a final decision. It is therefore an appealable order.

U. S. C. A., Title 28, Sec. 1291;

Federal Rules of Civil Procedure, 54(a).

Adjudication of a substantial right against a party in such manner as to leave no adequate relief except appeal, is an appealable order.

American Brake Shoe Foundry Co. v. N. Y. Rys. Co. (1922), 2 Cir., 282 Fed. 523.

That an order setting aside a judicial sale is a final decision and appealable when the order is ". . . and end to the proceedings as to the bidder's rights."

Dikeman, et al. v. Jewel Gold Mining Co., et al. (1924), 2 Cir., 2 F. 2d 665.

The order of August 31, 1951, was a "final decision" as to Appellant.

MacKinnon v. American Agar Co. (1934), 9 Cir., 73 F. 2d 835;

Sturgiss v. Corbin, supra.

The order of October 25, 1951, is appealable for the same reasons the order of August 31, 1951, is appealable.

Conclusion.

The foregoing discussion and the matters set forth in the transcript considered in relation thereto, establish:

1. The public auction held at the judicial sale made on August 13, 1951, was fairly and properly conducted.

2. Appellant acquired a vested right or title as purchaser at said sale and both the Court and Appellant became subject to an enforceable contract of sale.

3. The sale on August 13, 1951, was made by the Court itself and further approval of the sale to Appellant by the Court was not required.

4. The sale on August 13, 1951, was made at an adequate price.

5. The sale price accepted by the Court on August 13, 1951, was neither grossly inadquate nor was there any fraud or other improper conduct involved.

6. The lower Court erred in making the August 31, 1951, order purporting to vacate the sale made on August 13, 1951, by comparing the subsequent bid offered with the accepted sale price as a basis for determining whether the sale price accepted on August 13, 1951, was adequate.

7. The Court erred in considering as a "mistake" the attempted and also late telephone call of one Tictin, in not accepting as final and determinative, the fact that no mistake occurred in the conduct of the sale, that no fact sufficient in law or equity, occurred to challenge the integrity of the sale, and that it is the Appellant and not the stranger here who is entitled to the protection of the Court.

8. The Court erred in making the order of August 31, 1951, setting aside the sale held on August 13, 1951, on the ground that a subsequent offer was made after the sale at a higher price.

9. The October 25, 1951, order requiring Appellant, among other things, to file a supersedeas bond was an invalid order in its entirety.

10. Appellant acquired all the rights of a purchaser at the August 13, 1951, sale and the records do not disclose any legal, equitable or factual ground justifying the Court in vacating on August 31, 1951, its own sale made to Appellant on August 13, 1951.

Therefore, the orders made on August 31, 1951 and on October 25, 1951, should be declared invalid and reversed.

Respectfully submitted,

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